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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 705

JOSEPH Q. CIPRIANO,

Appellant,

versus

CITY OF HOUMA, G. LESLIE BROUSSARD, Mayor, CHRISTIAN L. OLIVER, CHARLES DAVIDSON, PETER BOURGEOIS, JR., SAMUEL LUSCO and WILBERT P. BONVILLAIN,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

BRIEF FOR THE SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT AS AMICUS CURIAE

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The Salt River Project Agricultural Improvement and Power District, a political subdivision of the State of Arizona, sponsored by and acting through its authorized law officer herein, submits this brief as amicus curiae under Rule 42(4) of the Rules of this Court.

QUESTIONS PRESENTED

1. Whether the rule of *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966) should be expanded to apply both to

(A) a bond election which affects only a limited aspect of the overall governmental functions of a municipality; and

(B) the payment of a tax as a condition of voting where the tax involved has as its principal purpose the raising of revenue rather than—as in the case of the poll tax—the establishing of a voting condition.

2. Whether the factors set forth in the lower Court's opinion, which the Louisiana Legislature could have taken into account in formulating its bond election voting requirements, can be said to be so erroneous as to be irrational.

3. Assuming, *arguendo*, that the decision of the lower court is to be reversed, whether any such reversal should be applied to bond elections held prior to the date of this Court's decision.

INTEREST OF THE SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT

The SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT (sometimes referred to hereinafter as the "District") is a political subdivision of the State of Arizona and was organized in 1937 under Arizona's Agricultural Improvement District Act. Arizona Revised Statutes, Title 45, Chapter 4. As an Agricultural Improvement District, the District enjoys all of the rights, privileges and benefits, and enjoys the immunities and exemptions of a municipality and political subdivision of the State of Arizona. Arizona Constitution, Article 13, Section 7. It is a special purpose district, which operates an electric generation and distribution system principally within the exterior boundaries of the Salt River Reclamation Project. The District serves more than 150,000 electric customers and is the principal source of all water within the Salt River Valley, which includes the City of Phoenix and surrounding communities.

Under contract with the United States Department of the Interior, the District and the Salt River Valley Water Users' Association operate the Salt River Reclamation Project, one of the oldest and one of the largest of the reclamation projects authorized under the Reclamation Act of June 17, 1902, 32 Stat. 388, 43 U.S.C. § 371 *et seq.* All of the net proceeds from the District's generation, sale, and distribution of electricity are used for the ultimate purpose of financing the reclamation activities of the Salt River Project. Indeed the sole reason for the existence of the District and its electric operations is to support the overriding reclamation objectives. *Uhlmann v. Wren,* 97 Ariz. 366, 401 P. 2d 113 (1965).

As a special purpose district and political subdivision of the State of Arizona, the District has the authority to issue bonds, repayable out of its electric revenues. The District's bonds are unlike those involved in the instant case in two respects: (1) they are general obligation bonds and (2) they become a lien upon all of the real property included in the District. A.R.S. § 45-1047.

Arizona law provides that an agricultural improvement district may elect to "provide for voting on an acreage basis . . ." in which case "each landowner possessing the qualifications of an elector shall be entitled to cast one vote at all elections . . . for each acre of land within the district owned by him. . . ." A.R.S. § 45-983. This option to provide for voting on an acreage basis was selected by the District upon its organization in 1937.

The largest bond issue in the history of the Salt River Project was approved by the District's landowners on October 28, 1968, authorizing the issuance of bonds in the amount of $180 million to finance expansion of facilities to meet the District's projected electric energy requirements over a period of approximately eight years. The proceeds from these bonds will be used to fulfill commitments which the District made both before and since the bond election, and will finance the orderly expansion of the District's electrical facilities needed in order to keep pace with its obligation

to serve electricity and agricultural and municipal water to the rapidly expanding greater Phoenix area. Any substantial delay in the issuance of these bonds would have a serious and adverse impact upon the orderly development of the reclamation activities of the Salt River Project, and generally upon the entire economy of Central Arizona.

A dependable supply of water and electricity being indispensable to any kind of development—whether agricultural, residential, commercial, or industrial—the ability of the Salt River Project to market the bonds which were authorized at the election held on October 28, 1968 is of great importance to a major segment of the State of Arizona. Accordingly, the interest of the Salt River Project Agricultural Improvement and Power District in this matter is in urging the correctness of the lower Court's judgment, but even more important, in urging that any rule announced by the Court imposing constitutional requirements for voting in bond elections be prospective only, so as not to create havoc with the financing of an orderly expansion of needed facilities, planned in accordance with law which existed as of the time that the bond elections were held.

ARGUMENT

I.

A. Last term, in *Avery v. Midland County,* 390 U.S. 474 (1968), this Court reaffirmed a distinction drawn during the previous term by *Sailors v. Board of Education,* 387 U.S. 105 (1967), that the "one man-one vote" principle of *Reynolds v. Sims,* 377 U.S. 533 (1964) and the other reapportionment cases does not apply to municipal entities exercising only limited governmental powers.

We recognize that the instant case does not fit squarely within the apportionment prototype, since the problem is one of classification of voters rather than one of dilution or weighting of the vote. Nevertheless, the sound policy determination underlying the holdings in *Sailors* and *Avery* seems completely applicable to the instant case: the equal protection clause of the United States Constitution recognizes a distinction between exercise of the voting franchise upon matters of general governmental interest, and matters of particular governmental interest, such as schools or electric service. In *Sailors v. Board of Education,* 387 U.S. 105, 110 (1967), this Court found important the fact that "the County Board of Education performs essentially administrative functions; and while they are important, they are not legislative in the classical sense." Similarly, in *Avery v. Midland County,* 390 U.S. 474 (1968), this Court stressed that "Our decision today is only that the Constitution imposes one ground rule for the development of arrangements of local government: a requirement that units with general governmental powers over an entire geographic area not be apportioned among single-member districts of substantially unequal population." 390 U.S. at 485-486.

It is true that the City of Houma exercises general governmental powers, but the election here involved—as was also true of the school board election in *Sailors*—affected only a particular segment of those general governmental powers, the construction by the City of an electrical power system.

The effect of the poll tax in *Harper v. Virginia State Board of Elections,* 383 U.S. 663 (1966) was entirely to foreclose voting on all political matters, just as the effect of malapportionment in *Reynolds v. Sims* and *Avery v. Midland County* was to dilute the power of the vote across the entire spectrum of political matters with which the Alabama legislature, in *Reynolds v. Sims,* and the Midland County Commissioners Court, in *Avery v. Midland County,* dealt. In the instant case, on the other hand, as in *Sailors v. Board of Education,* the franchise affects only a limited segment of governmental activity. Indeed, the activity involved in this case is not even essential to the functioning of government *qua* government. It is respectfully submitted that the *Harper* holding should not be expanded to apply to elections of such limited scope. By analogy to the reapportionment cases, the principle of *Harper v. Virginia State Board of Elections* should be held inapplicable to the bond election involved here.

A further distinction between *Harper* and the instant case is that the principal, if not the sole, purpose of the poll tax was as a prerequisite to voting. As long as the individual did not attempt to vote, no effort was made to collect a poll tax from him. The dominant purpose of real property taxation, by contrast, is not as a voting condition but as a revenue measure.

B. Even if the holding in *Harper v. Board of Elections* were to be expanded to embrace (1) bond elections of limited scope, and (2) real property taxes as well as poll taxes, it is well settled doctrine that the demands of the Fourteenth Amendment's equal protection clause are satisfied by a legislative classification which is not arbitrary nor invidious.

At least since *Nebbia v. New York,* 291 U.S. 502 (1934) it has been clear that neither this Court nor any other Court will, in the name of constitutional interpretation, substitute its judgment for the judgment of the legislature on basic policy matters, nor re-weigh the policy considerations which the legislature took into account in making its judgment. This principle applies with just

as much force to the equal protection clause as to the due process clause.

The factors which the Louisiana Legislature might properly have taken into account in determining that the right to vote in bond elections should be restricted to real property taxpayers have been adequately set forth by the lower Court in its opinion. See *Cipriano v. City of Houma,* 286 F. Supp. 823, 827 (E.D. La. 1968). In the language of the lower Court:

> "In all of these matters, their conclusion might be different from the ones we ourselves would reach, and the conclusion might be one that cannot be scientifically established or proved by a preponderance of the evidence. But the question is not whether they are right, but merely whether they are so wrong as to be irrational." *Ibid.*

It is respectfully submitted that the considerations set forth in the lower Court's opinion amply support the lower Court's conclusion that the Louisiana Legislature cannot be said to have acted invidiously nor arbitrarily in limiting the franchise in bond elections to real property taxpayers.

II.

The issue of most far-reaching impact in this case is whether—assuming *arguendo* that the Court were to hold that this case is to be reversed on its merits—the resulting rule should apply to bond elections which were held prior to the date of the Court's decision.

This Court's opinion in *Linkletter v. Walker,* 381 U.S. 618 (1965) contains an exhaustive discussion of the basic policy issues underlying prospective versus retroactive application of judicial determinations, particularly determinations by this Court. *Linkletter v. Walker* candidly discusses the error of the earlier cases, such as *Norton v. Shelby County,* 118 U.S. 425 (1886) which held that unconstitutional action "confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." 118 U.S. at 442.

It is now well settled that there is no constitutional requirement that constitutional decisions be given retroactive effect. In the language of Justice Cardozo, speaking for the Court in the leading case, *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932), "the Federal Constitution has no voice upon the subject." And, as this Court stated in *Linkletter v. Walker*, "while the cases discussed above [*Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940); *United States v. Schooner Peggy*, 1 Cranch 103, 2 L.Ed. 49 (1801); and others] deal with the invalidity of statutes or the effect of a decision overturning long-established common-law rules there seems to be no impediment—constitutional or philosophical—to the use of the same rule in the constitutional area where the exigencies of the situation require such an application." 381 U.S. at 628.

What, then, are the "exigencies of the situation" insofar as bond elections are concerned? The amicus curiae brief submitted by the State of Louisiana and the Louisiana Municipal Association contains a review of the states whose municipal bonding schemes might be affected by a reversal of the lower Court's holding. Inability of municipalities in these states to sell their presently approved but unissued bonds according to planned schedule would result in chaotic disruption of the orderly development of necessary governmental projects.[1]

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[1] The $180 million bond issue approved by the electors of the Salt River Project Agricultural Improvement and Power District on October 28, 1968, is illustrative. The District's total kilowatt hour sales during 1968 were 3.426 billion. These sales are projected to increase to 4.777 billion kilowatt hours in 1969, and 6.772 billion kilowatt hours by 1976. The lag time for construction of the additional power generating and transmission facilities and other support equipment required to supply these additional amounts of energy is on the order of several years. Turbine generators and other specialized equipment—some of which the District will need by the mid-1970's—must be ordered several years in advance. Since the bond election of October 28, 1968, the District has obligated itself to purchase portions of this needed equipment. It is for these reasons that the $180 million bond issue—virtually all of which has been ear-marked to supply these greatly expanded electric load requirements of the District—must be sold according to schedule. Failure to do so would not only spell disaster for the Salt River Project, but also for a large segment of agricultural, industrial, and commercial—and conceivably even residential—consumers of electricity within the greater Phoenix area.

Even though the instant case is different in some respects from the reapportionment cases, the relevant policy considerations insofar as the need for prospective remedy is concerned, are identical. Upon holding, in *Reynolds v. Sims,* 377 U.S. 533 (1964), that the apportionment of seats in the Alabama legislature violated the constitutional guarantee of equal protection, this Court could have proceeded to dissolve the State legislature, and invalidate the laws which it had enacted. The remedy selected was a far more practical one, one which effected an appropriate accommodation between the demands of equal protection of the laws, and the needs of state government to maintain its orderly and continuing governmental processes. In *Reynolds,* and indeed in all of the reapportionment cases of which we are aware, this Court has not only given prospective application to its reapportionment holdings, but has gone a step further, and allowed a reasonable time within which the State legislatures involved could prepare apportionment schemes which conformed to constitutional requirements. In *Roman v. Sincock,* 377 U.S. 695 (1964), for example, this Court commended the District Court for delaying its decision until after the 1962 election. In the language of the Court:

> "In giving the Delaware Legislature an opportunity to adopt a constitutionally valid plan of legislative apportionment, and in deferring decision until after the November 1962 general election, because of the imminence of that election and the disruptive effect which its decision might have had, the District Court acted in a wise and temperate manner." 377 U.S. at 709-710.

As recently as March 3, 1969, this Court refused to give retroactive effect to its decision in a voting case in *Allen v. State Board of Elections,* 89 S.Ct. 817 (1969). After holding that Section 5 of the Voting Rights Act of 1965, 79 Stat. 437, 42 U.S.C. § 1973 *et seq.,* required that certain changes in state election laws and regulations involved in *Allen* and other companion cases either be submitted to the United States Attorney General for approval, or a declaratory judgment action be brought in the Federal Dis-

trict Court for the District of Columbia, the Court observed as follows:

> "Appellants in the Mississippi cases have asked this Court to set aside the elections conducted pursuant to these enactments and order that new elections be held under the preamendment laws. The Solicitor General has also urged us to order new elections, if the State does not promptly institute § 5 approval proceedings. We decline to take corrective action of such consequence, however. These § 5 coverage questions involve complex issues of first impression—issues subject to rational disagreement. The state enactments were not so clearly subject to § 5 that the appellee's failure to submit them for approval constituted deliberate defiance of the Act. Moreover, the discriminatory purpose or effect of these statutes, if any, has not been determined by any court. We give only prospective effect to our decision, bearing in mind that our judgment today does not end the matter so far as these states are concerned." 89 S.Ct. at 835.

See also *Desist v. United States,* No. 12, October Term 1968 and *Kaiser v. New York,* No. 62, October Term 1968, both decided March 24, 1969.

The potential for disruption of orderly state processes resulting from a retroactive reversal in the instant case is far greater than in the *Allen* case. See *State v. Martin,* 62 Wash. 2d 645, 384 P.2d 833 (1963). It is further significant that here, unlike the situation in *Allen,* both parties and both of the amici agree that a reversal, if any, should be given only prospective effect.

In our view, the dispositive fact is that in no instance has an act of a malapportioned legislature ever been invalidated. If this Court were now to call into question bonding schemes which have been utilized by many states and their political subdivisions for more than a hundred years, the same considerations for preventing the disruption of orderly state financing processes should be applied here as in the reapportionment cases. Preferably—again by analogy to the reapportionment cases—the State should be given a reasonable time to enact new statutes to conform to the Court's rule. At the very least, it should be clarified that bonds which

were authorized at elections held prior to the date of the Court's decision may be issued as planned.

It would not be sufficient in a case of this kind to await a future lawsuit to determine whether a reversal, if any, should be retroactive or prospective. A reversal in this case without an express limitation of the holding to future cases would immediately cast a cloud upon the billions of dollars of presently authorized but unissued bonds of state and local governments. Even assuming that many of the entities issuing these bonds would eventually be able to establish that the authorizing election fell within the permissible boundaries marked out by the Court's opinion, this would not forestall the intervening calamitous consequences; in most instances, the mere filing of a lawsuit challenging the election on constitutional grounds has the effect of rendering the bonds unsaleable.

The interdiction of all authorized but unissued bonds of political subdivisions whose electors must be real property taxpayers would be an inordinately severe remedy. Moreover, such a remedy would be not only unnecessary, but indeed inimical, to the orderly establishment of new state municipal bond election voting schemes which conform to whatever constitutional requirements may be set forth in the Court's opinion.

CONCLUSION

In *Roman v. Sincock,* this Court praised the district court for having delayed its decision until after the 1962 election, "because of the imminence of that election and the disruptive effect which its decision might have had. . . ." 377 U.S. at 709-710. Following the decision of this Court, in *Roman v. Sincock,* which was handed down on June 15, 1964, the case was remanded to the District Court with the following instructions:

> "Acting under general equitable principles, the court below must now determine whether it would be advisable, so as to avoid a possible disruption of state election processes and permit additional time for the Delaware Legislature to adopt a constitutionally valid apportionment scheme, to allow the 1964 election of Delaware legislators to be conducted pursuant to the provisions of the 1963 constitutional amendment, or whether those factors are insufficient to justify any further delay in the effectuation of appellees' constitutional rights." *Id.* at 711-712.

For reasons set forth in Section I of the Argument portion of this brief, we urge that the judgment of the district court be affirmed. Of far greater importance than affirmance or reversal, however, is the compelling need to follow the same remedial procedures that were brought into play in the reapportionment cases. Preferably, this would mean that in the event of reversal, state legislatures should be given a reasonable time within which to reform their municipal bond election voting schemes to conform to the Court's guidelines. At the very least, in the event of a reversal, the Court should clarify that its holding does not apply to bond elections which were held prior to the date of the Court's decision.

Respectfully submitted,

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